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No. 80-728

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT COLETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the admission of an out-of-court statement against the penal interest of an unavailable witness, pursuant to Rule 804(b)(3) of the Federal Rules of Evidence, violated petitioner's Sixth Amendment confrontation rights.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1980. The petition for a writ of certiorari was filed on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of stealing copper wire from an interstate shipment, in violation of 18 U.S.C. 659; transportation of the stolen copper wire and of stolen tractor-trailers in interstate commerce, in violation of 18 U.S.C. 2312 and 2314; and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[1] He was sentenced to three years' imprisonment, to be followed by a three-year probation term. The court of appeals affirmed (Pet. App. A).

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[1]Co-defendants Frank Bolettieri, Vincent Guerra, Vito Puma and Salvatore Graffagnino were also convicted on all four counts.

1. The testimony at trial showed that in January 1977, Michael Nicolo[2] told FBI informant Albert Katno that some people were planning to hijack four tractor-trailers and were looking for storage places in which to conceal them. Katno, who had purchased stolen goods from Nicolo on numerous past occasions, offered to help Nicolo locate "drops" for the stolen goods. Katno thereafter sought petitioner's assistance. Petitioner expressed an interest in buying stolen goods, preferably coffee, and agreed to help Katno in obtaining the drops. Petitioner subsequently informed Nicolo that he could provide one drop in the Bronx for $300 per trailer and one in Brooklyn for $1,000 for two trailers. Petitioner stated that he would provide the location of the drops when the trailers arrived in New York (Tr. 138-154).

Following a change in date of the planned hijack, petitioner obtained a new drop in Connecticut where all four tractor-trailers could be hidden at a cost of $1,200. When attempts to hijack the tractor-trailers were unsuccessful, Katno asked petitioner to locate a drop for a hijacking a few weeks later. Petitioner agreed to supply the original Bronx and Brooklyn drops, on the condition that the drops be paid for even if they were not used (Tr. 159-167, 203-204, 209-212, 217-218).

On March 5, 1977, co-defendants Bolettieri, Puma, Guerra and Graffagnino, along with three other individuals, broke into a freight yard in Seekonk, Massachusetts. By checking the papers in the bill box and cutting the seals on several of the trailers, they determined that the best loads were two trailers containing copper wire. When apprised of this, petitioner informed Katno that he did not wish to purchase copper wire. Upon learning of petitioner's lack of interest in the wire, co-defendant Bolettieri and his cohorts broke into another Massachusetts freight yard and investigated the available loads, but failed to discover any better goods. Guerra so advised Nicolo, who instructed him to bring the copper wire loads to New York. Nicolo and Katno thereafter told petitioner that the hijacked trailers contained loads of coffee (Tr. 227-237, 310-312, 321-322, 800-801, 811-812, 823-825, 1146).

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[2]Prior to trial co-defendant Michael Nicolo entered a plea of guilty to two counts of the indictment.

The seven men in Massachusetts stole the two tractor-trailers that were loaded with copper wire and drove them, accompanied by two "escort" cars, to New York. However, when the driver of one of the escort cars arrived at the Bronx drop and informed petitioner of the trailer's contents, petitioner locked them out of the drop. The two stolen tractor-trailers were later abandoned after one of them was involved in an accident. Thereafter co-defendant Puma and others unsuccessfully sought reimbursement from petitioner for the value of the lost loads (Tr. 242-246, 276-277, 281, 285-287, 312-316, 321-322, 1018-1020, 1058).

2. At trial, the government offered into evidence portions of two tape-recorded conversations between an undercover officer and Nicolo.[3] The recorded conversations took place on April 1 and April 11, 1977, when Nicolo attempted to purchase narcotics from the undercover agent. In the course of these conversations, Nicolo stated that both he and petitioner had participated in the March 5 theft of the trailers. Nicolo described his negotiations with petitioner regarding the drops for four tractor-trailers and also petitioner's refusal to accept delivery of the stolen goods when he discovered that the trucks contained copper and not coffee. In addition, Nicolo related that his co-conspirators blamed petitioner for the loss of the stolen cargo and that they had subsequently assaulted petitioner in an attempt to force petitioner to defray their losses.

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[3]Although petitioner objected to the admission of these tapes, he never suggested that any references to himself be redacted. To the contrary, he insisted that if the tapes be admitted at all, that they be admitted without "the redaction of any word from these tapes or what this man said" (Tr. 1300).

At the close of the government's case, the trial court held that the recorded statements made by Nicolo, who declined to testify at trial on Fifth Amendment grounds, were admissible as declarations against penal interest under Fed. R. Evid. 804(b)(3). The court further concluded that the admission of the statements did not violate the Confrontation Clause (Tr. 1311-1317). Observing that the tape recordings merely corroborated other evidence at trial, including the testimony of informant Katno, the court found that the evidence was neither crucial to the prosecution nor devastating to petitioner's defense (*id.* at 1313-1314, 1317). In addition, the court determined that the statements were extremely reliable: the tape recordings, which were strongly corroborated by other evidence, were made in circumstances guaranteeing their trustworthiness (*id.* at 1314-1317).

ARGUMENT

Petitioner contends (Pet. 4-8) that the admission into evidence of the tape recorded conversations between coconspirator Nicolo and an undercover agent violated his Sixth Amendment confrontation rights. Petitioner concedes, however, that the statements fall within the well-settled hearsay exception for statements made against the declarant's penal interest. See, *e.g.*, Fed. R. Evid. 804(b)(3); McCormick, *Evidence* §§ 277-280 (2d ed. 1972). Nicolo was unavailable to testify at trial.[4] Moreover, his statements, which were made in the course of a narcotics transaction and which were corroborated both by the testimony at trial and by Nicolo's statements at the time of his plea of guilty, were both self-inculpatory and trustworthy. Accordingly, the district court did not abuse its broad discretion in admitting those tape recordings under Fed. R. Evid. 804(b)(3). See, *e.g.*, *United States* v. *Garris*, 616 F. 2d 626, 629-633 (2d Cir. 1980), cert. denied, No. 79-6313 (June 16, 1980); *United States* v. *Goins*, 593 F. 2d 88, 91 (8th Cir.), cert. denied, 444 U.S. 827 (1979); *United States* v. *Alvarez*, 584 F. 2d 694, 699 (5th Cir. 1978); *United States* v. *Hoyos*, 573 F. 2d 1111, 1115 (9th Cir. 1978); Advisory Committee Note to Proposed Rule 804(b)(3), 56 F.R.D. 327-328 (1972).

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[4]Nicolo's attorney informed the trial court that Nicolo would invoke his Fifth Amendment privilege against compulsory self-incrimination if called to testify. Nicolo had not been sentenced at the time of trial, and the conversation in question implicated Nicolo in crimes for which he had not been indicted. The court therefore exempted Nicolo from testifying, thereby rendering him "unavailable" for purpose of Rule 804(a)(2).

For similar reasons, the court of appeals correctly concluded that the admission of these statements did not run afoul of the Confrontation Clause. To be sure, although the hearsay rules and the Confrontation Clause "are generally designed to protect similar values," the two are not congruent. See, *e.g., Dutton* v. *Evans*, 400 U.S. 74, 81-82 (1970) (plurality opinion); *California* v. *Green*, 399 U.S. 149, 155-157 (1970). But constitutionally adequate "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ohio* v. *Roberts*, No. 78-756 (June 25, 1980), slip op. 9. Here, moreover, the challenged evidence unquestionably bears sufficient " 'indicia of reliability' " to " 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement' " *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972), quoting *Dutton* v. *Evans, supra*, 400 U.S. at 89. See, *e.g., Ohio* v. *Roberts, supra*, slip op. 16; *California* v. *Green, supra*.

Nicolo's statements against his penal interest were recorded at a time when he had no reason falsely to inculpate himself or others. Compare *United States* v. *Oliver*, 626 F. 2d 254, 261 (2d Cir. 1980); *United States* v. *Love*, 592 F. 2d 1022, 1025 (8th Cir. 1979); and *United States* v. *Bailey*, 581 F. 2d 341, 345 (3d Cir. 1978); with *United States* v. *Lilley*, 581 F. 2d 182, 187-188 (8th Cir. 1978), and *United States* v. *Gonzalez*, 559 F. 2d 1271, 1273 (5th Cir. 1977). His statements, which were based on his personal participation in the events, were corroborated by and consistent with the other evidence at trial, including the testimony of Katno and the various police officers, as well as a tape recorded statement of another co-defendant. Finally, Nicolo reiterated these statements at the time of his guilty plea. In these circumstances, the courts below correctly concluded that the extremely reliable tape recordings of an unavailable witness passed muster under the Confrontation Clause. See, *e.g., Dutton* v. *Evans, supra*, 400 U.S. at 88-89.

Petitioner nonetheless suggests that the statements were inadmissible because they were "critical" to the prosecution and "devastating" to his defense, and that the courts of appeals are in conflict over the application of these tests. At the outset, we note that this Court has never suggested that the devastating or crucial nature of otherwise admissible hearsay evidence is an independent restriction under the Confrontation Clause, rather than being simply one of the factors to be considered in evaluating the reliability of the evidence. See *Ohio* v. *Roberts, supra*, slip op. 8-16; *Dutton* v. *Evans, supra*, 400 U.S. at 87-89. In any event, this case does not afford the Court an occasion to resolve whatever slight differences there may be among the courts of appeals on this question.[5] The district court found (Tr. 1311-1317)—and the court of appeals did not disagree (Pet. App. 3a)[6]—that Nicolo's statements were neither devastating nor crucial. Given the testimony of informant Katno, another co-conspirator, and the surveillance agents, as well as the other tape recordings of co-conspirators admitted at trial, Nicolo's statements were merely cumulative of the other evidence. Further review of this fact-bound question is unwarranted.

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[5]In *United States* v. *West*, 574 F. 2d 1131, 1138 (4th Cir. 1978), the court of appeals stated in dictum that reliable hearsay is admissible under the Confrontation Clause regardless of its devastating or crucial nature. In *United States* v. *Balano*, 618 F. 2d 624, 627 (10th Cir. 1979), Judge McKay, *speaking only for himself* (see *id.* at 633), disagreed with the *West* decision insofar as it apparently suggested that evidence that satisfies Fed. R. Evid. 804(b)(5), the catchall provision for reliable hearsay, necessarily satisfies the Confrontation Clause. There is thus no actual conflict among the courts of appeals at this time. We further note that this case involves hearsay admitted under the well-settled exception for declarations against penal interest and not Rule 804(b)(5).

[6]Petitioner erroneously states (Pet. 7) that the court of appeals rejected the district court's findings on the critical nature of Nicolo's statements. The court of appeals stated, however, that these statements were clearly not crucial or devastating as to petitioner's co-defendant, and that, although the question was closer with regard to petitioner, "since the tape recorded statement was extraordinarily reliable, its admission cannot be said to have violated [petitioner's] confrontation rights" (Pet. App. 3a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DEBORAH WATSON
Attorney

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